

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

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| UNITED STATES OF AMERICA |) | Civil Case No. 7:01cv00383 |
| |) | Criminal Case No. 7:97cr00024-4 |
| |) | |
| v. |) | <u>2255 MEMORANDUM OPINION</u> |
| |) | |
| RAYED FAWZI ABED, |) | By: Michael F. Urbanski |
| Petitioner. |) | United States District Judge |

Rayed Fawzi Abed, a federal inmate proceeding *pro se*, filed a motion for reconsideration (Docket No. 18) in his closed 28 U.S.C. § 2255 action, seeking review of his 1998 judgment in light of Alleyne v. United States, 133 S. Ct. 2151 (2013), and Rosemond v. United States, 134 S. Ct. 1240 (2014).¹ The court finds that Abed’s instant motion is, for all intents and purposes, an unauthorized, successive § 2255 motion and, therefore, construes it as such and dismisses it without prejudice.

Abed challenges his 438-month sentence and convictions for being a member of a criminal enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d) (RICO), conspiring to violate RICO, and a host of offenses arising out of his membership in the RICO enterprise. Court records indicate that Abed previously filed a § 2255 motion regarding the same convictions and sentence, which the court denied. See Civil Action No. 7:01cv00383. The court may consider a second or successive § 2255 motion only upon specific certification from the United States Court of Appeals for the Fourth Circuit

¹ In Alleyne, the Supreme Court held that, other than prior convictions, “facts that increase [statutory] mandatory minimum sentences must be submitted to the jury.” 133 S. Ct. at 2163. In Rosemond, the Supreme Court reversed a defendant’s conviction for aiding and abetting a § 924(c) offense, finding that it had been error not to instruct the jury that in order to convict, it was necessary that the government prove that the defendant had advance knowledge that a gun would be used. 134 S. Ct. at 1251-52.

that the claims in the motion meet certain criteria.² See § 2255(h). As Abed has not submitted any evidence of having obtained certification from the Court of Appeals to file a second or successive § 2255 motion, the court must dismiss his motion without prejudice as successive.³

Entered: October 21, 2014

Michael F. Urbanski

Michael F. Urbanski
United States District Judge

² The court notes that in United States v. Hairston, No. 12-8096, 2014 U.S. App. LEXIS 10846, 2014 WL 2600057 (4th Cir. June 11, 2014), the Fourth Circuit held that “a numerically second § 2255 motion should not be considered second or successive pursuant to § 2255(h) where . . . the facts relied on by the movant seeking resentencing did not exist when the numerically first motion was filed and adjudicated.” Cf. 28 U.S.C. § 2255(h). In the instant matter, however, there are no new facts upon which Abed is relying. Rather, Abed’s claim is based on a change in law that he believes affects his sentence. Accordingly, Hairston is inapplicable in this matter. See e.g., United States v. Norman, No. 14-7088, 2014 U.S. App. LEXIS 18698, 2014 WL 4825246 (4th Cir. Sept. 30, 2014) (district court lacked authority to consider petitioner’s Alleyne claims where petitioner had not first obtained permission from the Court of Appeals to file a second or successive 2255 motion).

³ Petitioner is hereby advised of the procedure for obtaining certification from the United States Court of Appeals for the Fourth Circuit to have this court review a successive § 2255 motion. Petitioner must submit a copy of the successive § 2255 motion to the Court of Appeals, along with a motion requesting a three-judge panel certification that the district court may review the successive § 2255 motion. 28 U.S.C. § 2244. A Fourth Circuit form and instructions for filing this motion are available from the Fourth Circuit at the following address: Office of the Clerk, United States Court of Appeals for the Fourth Circuit, 900 E. Main St, Richmond, VA 23219.